View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by DigitalCommons@University of Nebraska

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American Judges Association

American Judges Association

May 2005

Court Review: Volume 42, Issue 1 - Judicial Accountability, Fairness, and Independence

Roger K. Warren
National Center for State Courts

Follow this and additional works at: https://digitalcommons.unl.edu/ajacourtreview

 Part of the Jurisprudence Commons

Warren, Roger K., "Court Review: Volume 42, Issue 1 - Judicial Accountability, Fairness, and Independence" (2005). *Court Review: The Journal of the American Judges Association*. 41.
https://digitalcommons.unl.edu/ajacourtreview/41

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Judicial Accountability, Fairness, and Independence

Roger K. Warren

Editor's Note: Roger Warren, former California trial judge and president of the National Center for State Courts, presented the Justice Robert H. Jackson Lecture at the National Judicial College on July 21, 2005. We reprint his remarks here.

Much attention has focused of late on unfair attacks on judges leveled in nominal pursuit of greater judicial accountability. In response to the refusal of the federal courts to intervene in the Terry Schiavo case, for example, House Majority Leader Tom DeLay angrily declared that Congress has for many years "shirked its responsibility to hold the judiciary accountable."

"No longer," the leader said. "We will look at an arrogant, out of control, unaccountable judiciary that thumbed their nose at the Congress and President when given jurisdiction to hear this case anew. . . . The time will come for the men responsible for this to answer for their behavior."[1]

A week later Senator John Cornyn, commenting on Supreme Court Justice Anthony Kennedy's recent majority opinion holding unconstitutional the death penalty for juvenile offenders, speculated that recent courthouse violence might be due to public frustration with decisions of judges who "are unaccountable to the public." [2] Others called for Justice Kennedy's impeachment.[3] Not to be outdone in the pursuit of judicial accountability, author Edwin Vieira said his "bottom line" for dealing with such errant judges came from Joseph Stalin: "He had a slogan and it worked very well for him whenever he ran into difficulty," Vieira declared: "'No man, no problem.'"[4]

Much recent attention has also focused on expanded efforts to achieve judicial accountability of elected state judiciaries through the ballot box. In 2004, for example, state supreme court incumbents faced opposition in 18 of the 20 states with contested elections on the ballot. Supreme court campaigns attracted network television ads in four times as many states as in 2000, at over two-and-a-half times the cost. The number of attack ads nearly doubled. Special-interest groups and political parties provided over three quarters of the candidate funding, and covered almost 90% of the costs of the attack ads. The average cost of a successful campaign increased by 45% to over $650,000. A 2004 national survey found that 71% of Americans believed that judicial campaign contributions from special-interest groups affect judges' decisions in the courtroom.[5]

Efforts such as these to achieve judicial accountability in ways that unnecessarily or unduly interfere with the independence of the judiciary are inappropriate. Unfair personal attacks on judges, and electoral campaigns by special-interest groups to unseat judges with whose judicial decisions they disagree, unduly interfere with judicial independence and are inappropriate means of securing judicial accountability.

Indeed, the comments of DeLay and Cornyn brought immediate rebuke as improper interference with judicial independence. Vice President Richard B. Cheney called DeLay's comments "inappropriate." Cheney added, "There's a reason why judges get lifetime appointments"[6]

President George W. Bush declared "I believe in an independent judiciary."[7] The *Washington Post* editorialized that "this country has an independent judiciary precisely to shield judges who make difficult decisions under intense political and time pressure from the bullying of politicians."[8] DeLay apologized.[9]

The National Center for State Courts, the American Bar Association, the Justice at Stake Campaign, and other organizations now lead national efforts to reduce the threat to judicial independence that arises out of the use of campaign attack ads, undue electoral influence of special-interest groups and political parties, and other harmful judicial-election campaign practices.

There are many threats to judicial independence. Roscoe Pound observed 100 years ago that "dissatisfaction with the

Footnotes

1. *See* Mike Allen, *DeLay Wants Panel to Review Role of Courts; Democrats Criticize His Attack on Judges*, WASH. POST, April 2, 2005, at A9; Sheryl Gay Stolberg, *Republican Lawmakers Fire Back at Judiciary*, N.Y. TIMES, July 1, 2005, at A10.
2. *See* Charles Babington, *Senator Links Violence to "Political" Decisions; "Unaccountable" Judiciary Raises Ire*, WASH. POST, April 5, 2005, at A7.
3. *See* Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, April 9, 2005, at A3.
4. *See id.*
5. The 2004 judicial-election information is detailed in DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER, & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004 (2005) (Jesse Rutledge, ed.), *available on the web at* http://www.followthemoney.org/press/Reports/200506271.pdf (last visited Oct. 15, 2005).
6. Mike Allen & Brian Faler, *Cheney Opposes Retribution Against Schiavo Judges*, WASH. POST, April 4, 2005, at A4.
7. Nina J. Easton, *Rift Emerges in GOP After Schiavo Case,* BOSTON GLOBE, April 9, 2005, *available on the web at* http://www.boston.com/news/nation/washington/articles/2005/04/09/rift_emerges_in_gop_after_schiavo_case?mode=PF (last visited Nov. 20, 2005).
8. *Beyond the Pale,* WASH. POST, April 17, 2005, at B6.
9. Mike Allen, *DeLay Apologizes for Comments; Leader Wouldn't Say Whether He Wants Schiavo Judges Impeached*, WASH. POST, April 14, 2005, at A5.

administration of justice is as old as law." And, clearly, there is no easier way to strike a harmonious chord with an audience of judges than to decry the increasing number of unfair personal attacks on the judiciary. Yet, many sources of dissatisfaction and threats to judicial independence are beyond our control. Unfair attacks on appointed and elected judges typically emanate from controversial judicial decisions involving issues affecting powerful special interests—or about which segments of the public hold intense or evangelical views. Justice Jackson, to whose memory this lecture series is dedicated, spoke himself of this phenomenon over a half century ago. "[W]e must not forget," he observed, "that in our country are evangelists and zealots of many different political, economic, and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous."[10] Despite the best efforts of judges to effectively explain and communicate their decisions, public expression of dissatisfaction with judicial decisions—and unfair attacks on judges—are inevitable.

As Pogo reminds us, however, oftentimes "we have met the enemy and it is us." Oftentimes, we as judicial officers allow threats that originate outside the judiciary to distract us from proper focus on the much more dangerous threats that result from our own unsatisfactory performance. We become preoccupied with the external threats to judicial independence over which we have little control rather than fully accepting accountability for our own performance—over which we have almost complete control. We must examine our own performance honestly—and demonstrate the courage and ability to improve our performance when it is found insufficient.

Judicial independence concerns the judiciary's freedom from improper control, influence, or interference in the decision of cases—and in the governance and management of the judiciary's affairs. Sometimes we forget that judicial independence is not an end in itself but merely a means to an end. With respect to judicial decision making, the object of judicial independence is to ensure judicial fairness—that judicial decisions are based solely on evidence and law and not influenced by any improper consideration. With respect to judicial decision making, judicial independence is the freedom to be fair.

Judicial accountability refers to the accountability under democratic government of those who govern to those whom they govern—as well as to the rule of law. Unfortunately, unfair attacks on the courts—and other inappropriate acts undertaken in the name of judicial accountability—have tended to give the concept of judicial accountability itself a bad name. But unlike the concept of judicial independence, accountability is an end in itself and applies to all three branches of government. The judiciary is not exempt from the requirement of accountability to the people it serves for the proper performance of its duties.

When we as judges speak of judicial independence as if it is an end in itself, or as if it is unlimited, or intended merely for our own personal benefit as judges rather than for the benefit of litigants, we risk creating the impression that we regard ourselves as being above the law, or less accountable for our performance than other governmental officials are for theirs. The judiciary is after all a co-equal branch of government, neither lesser nor superior to any other. Judicial independence does not excuse the courts from compliance with appropriate standards of accountability: it merely helps define the standards of accountability that are appropriate.

Judicial independence does not excuse the courts from compliance with appropriate standards of accountability: it merely helps define the standards . . . that are appropriate.

How shall we be judged? By what standards should the courts be held accountable? It is critical that the courts themselves define and communicate the standards by which their performance may properly be judged. Unless and until we do so, we will continue to be judged by standards, oftentimes inappropriate, fashioned by others. We must define and communicate not only what the public does not have a right to expect from the courts, but also what the public and other branches do have the right to expect.

The public does not have the right to expect, for example, that judicial decisions will invariably be popular or always to its satisfaction. Cases must be decided based on facts and law, not public appeal. For the legal correctness of their decisions, courts are accountable neither to the other branches of government nor to the electorate—but to principles of law as interpreted by higher courts.

The public does have the right to expect, however, that courts will be run efficiently and in a professional manner, and that every person will be treated fairly and equally. The public also has the right to expect that judges will be competent, knowledgeable about the law, and willing and able to behave in accord with the highest ethical standards.

Many courts have adopted either trial or appellate court performance standards by which court performance may properly be measured. The National Center for State Courts has recently formulated ten basic statistical measures of court performance.[11] Formal criteria for evaluation of judges exist in many states using merit selection or retention processes. The ultimate standard to which judges and courts should be held accountable, however—and the real test of judicial performance—is whether courts serve to the general satisfaction of the litigants and public whom they serve. The courts are also dependent on public trust and confidence to obtain the public resources and inter-branch cooperation that are indispensable

10. *American Communications Association v. Douds,* 339 U.S. 382, 438 (1950) (Jackson, J., concurring and dissenting).
11. These measures, called CourTools, are available at http://www.courtools.org. An overview can be found on the Resource Page of this issue of *Court Review* at page 44.

In the long run, legitimate criticism of the judiciary, left unaddressed, is a far greater threat to the independence of the judiciary than unfounded attacks.

to a functioning judiciary.

Over the last five years, the National Center for State Courts has conducted a number of state and national public opinion surveys to identify the factors that most directly affect public confidence in the courts.[12] Although surprising to many, the survey findings consistently identify the direction in which courts must proceed to build greater public trust.

First, the extent of public confidence in the courts depends substantially more on the respondents' perceptions of the extent of judicial fairness than on any other aspect of court performance or demographic factor. Whereas attorneys' (and judges') views of court performance depend more on their perceptions of the fairness of court outcomes (in contrast to the fairness of court procedure), the views of litigants and members of the public are influenced almost twice as much by their views of the fairness of court procedure than by their views of the fairness of court outcomes.

What do we mean by the fairness of court procedure? The most recent survey used four procedural characteristics to define the concept of procedural fairness: whether the courts (1) are unbiased; (2) treat people with respect; (3) listen carefully to what people have to say; and (4) are trustworthy, *i.e.*, care about the people before them and take their individual needs into account. The single factor that most greatly influences respondents' perceptions of the extent of procedural fairness is their perception of whether judges are honest and fair.

Second, although those with prior jury service experience hold more favorable views than others of the fairness of court processes, those with direct prior experience as litigants hold less favorable views of the courts' procedural fairness. The types of cases in which respondents are most critical of procedural fairness are the high-volume cases in which ordinary citizens and unrepresented litigants most frequently appear: traffic, family, and small-claims cases.

Third, whereas two-thirds or more of white, Hispanic, and Asian-Americans believe that the courts are procedurally fair, a majority of African-Americans do not. Moreover, a majority of all respondents believe that African-Americans and Hispanic-Americans usually receive less favorable results in court than others, and about two-thirds believe that low-income people and non-English speakers receive less favorable results.

Fourth, the single area of court responsibility in which respondents' expectations of court performance are most frequently unmet is the expectation that the court should "report to the public on its job performance," *i.e.*, judicial accountability.

If the courts are to reinforce and improve their standing with the public, judges need to critically self-examine the fairness of their interactions, as well as the interactions of court staff, with those who use our courts, including in traffic, family, and small-claims cases. They must also redouble their efforts to address widespread perceptions of unequal treatment in the justice system—for the poor, non-English speaking, and minorities. Finally, the courts must more clearly acknowledge their accountability to the public they serve and find more and better ways to report on their performance to the public.

In the long run, legitimate criticism of the judiciary, left unaddressed, is a far greater threat to the independence of the judiciary than unfounded attacks. And understandably so. Democracy is a system of checks and balances. How can the judiciary expect the public or other branches of government to defer to the independence of the judiciary if the judiciary cannot demonstrate its own ability to do a good job—and properly manage its own affairs? As one commentator has noted, "Part of being master of your own home is keeping your house in order."[13] In effect, our system of checks and balances strikes a bargain with the judiciary. In consideration for the judiciary's relative independence, the public and other branches of government expect that we will do our job well and keep our house in order. If we cannot, or do not, do that, we are not in any credible position to complain about the inevitable intrusions on our independence that result.

Among the various sources of legitimate criticism, the greatest threat to judicial independence is the perception that courts do not treat people fairly and equally. The surveys show that these perceptions affect public confidence in the judiciary more than any other factor. Judicial fairness and equal justice under law are fundamental expectations of the American justice system—and of judges in particular. Unfair and unequal treatment are perceived by litigants and the public not as incidents of technical incompetence but as fundamental defects of judicial character. Lay members of the public may not believe that they have sufficient qualifications or experience to evaluate judicial competence—or determine whether judges have correctly decided the law—but they surely do believe that they are able to judge our character, our honesty and our fairness, and decide whether we are worthy of their trust.

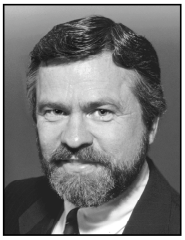
Yes, we in the judiciary must seek to protect American courts from unfair attacks leveled in the name of judicial accountability and from other inappropriate external interfer-

12. The most recent survey was in California: DAVID B. ROTTMAN, PART 1: FINDINGS AND RECOMMENDATIONS TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS (Judicial Council of California/Administrative Office of the Courts, 2005).
13. G. Alan Tarr, Director, Center for State Constitutional Studies, Rutgers University-Camden, speaking at the American Judicature Society Mid-Year meeting on February 28, 2004, *in* Panel Discussion, "The Courts, the Legislature, and the Executive: Separate and Equal?" JUDICATURE 230, 239 (March-April 2004).
14. *Call to Action: Statement of the National Summit on Improving Judicial Selection* (National Center for State Courts 2001), *available on the web at* http://www.ncsconline.org/WC/Publications/Res_JudSel_CallToActionPub.pdf (last visited Oct. 15, 2005). Among other things, the Call to Action urged that all judicial elections be nonpartisan, that non-governmental monitoring groups be established to encourage fair and ethical judicial campaigns, and that greater information be provided to voters by state and local governments concerning judicial candidates.

ence in the independence of courts. For example, we must continue to implement the recommendations put forth in the Call to Action issued by participants in the National Summit on Improving Judicial Selection held December 2000.[14] We must not be distracted, however, from maintaining an even firmer resolve to address legitimate criticism of our performance in administering justice fairly, equally, and effectively. In the end, the surest path to true independence is the path of judicial accountability—wherein the courts define and communicate the standards to which they may properly be held accountable—and then continuously demonstrate to the satisfaction of the public and other branches of government that their performance meets those standards. Most critically, the courts must honestly reexamine whether their day-to-day processes provide fair and equal treatment to all.

It is we the judges who must lead this charge. If we do, future external attacks on the judiciary, albeit troubling, will substantially erode neither public trust in the courts nor the courts' continued independence.

In closing, let us be reminded that judicial independence is only a concept, an ideal. The United States enjoys the strongest and most independent judiciary in the world, and our federal and state constitutions contain provisions intended to promote the independence of our judiciaries. There is nothing in our laws, however, that guarantees judicial independence. Judicial independence has to be continually fought for—and won anew—each day. It is grounded in public respect for the courts and for the judicial function. Like respect, it cannot be demanded. It must be earned.



Roger K. Warren served as president from 1996 to 2004 of the National Center for State Courts, where he led initiatives to promote public trust and confidence, best practices, civil-justice reform, and racial and ethnic fairness. His judicial career began as a municipal judge in Sacramento, California, where he served for six years. He then became a judge on the Sacramento Superior Court, where he served from 1982 to 1996, including several years as presiding judge of the court or its divisions. A graduate of the University of Chicago Law School, Warren was named California's jurist of the year in 1995 by the California Judicial Council. He presently serves both as a consultant to the National Center for State Courts and as a scholar-in-residence for the California Administrative Office of Courts. In addition, Warren serves as chair of the board of directors of the Justice at Stake Campaign, a coalition of state and national organizations (including the American Judges Association) committed to maintaining fair, impartial, and independent courts.